No. 10,807.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HILLCONE STEAMSHIP COMPANY (a corporation), SANTA CRUZ OIL COMPANY (a corporation), and ASSOCIATED INDEMNITY CORPORATION (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Compensation Commission, for the Thirteenth District, and ALBERT V. STEFFEN,

Appellees.

APPELLEES' REPLY BRIEF.

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STATEMENT OF THE CASE.

Because appellees deem the statement of the case and facts to be materially different in some respects from that presented by appellants, the appellees present the following statements:

In the latter part of February, 1938, the appellee, Albert V. Steffen, fell from a ladder attached to the S. S. Prentiss onto a pontoon. The ship was in the waters of the Pacific at Long Beach. As a result of the fall,

Steffen sustained an injury which was compensable under the Longshoremen's and Harbor Workers' Compensation Act. He was not, however, disabled for work until August 5, 1938, at which time admission to the United States Marine Hospital, San Francisco, was obtained for him by Fred Cordes, his employer's agent and district manager, under whose jurisdiction Steffen worked. Steffen had orally notified Fred Cordes of the accident on the day it occurred, as well as on various occasions thereafter, and shortly after Steffen entered the hospital he was told by Cordes that he would be "taken care of." The employer did not thereafter or at any time make a report of the accident or injury to the Commissioner or Deputy Commissioner as required by Section 30(a) of the Act. On June 25, 1938, the Act was amended to provide that the statute of limitations did not begin to run as a bar against claims for compensation under the Act until the injury was reported by the employer to the Deputy Commissioner. Steffen filed his claim for compensation on Jan. 20, 1941, while he was still in the hospital, and claimed that the plea of the statute of limitations was not good as against his claim because:

(1) Steffen's right to file a claim for compensation did not accrue until August, 1938;

(2) The statute of limitations was extended by the amendment of June 25, 1938, as to claims accrued but not then barred;

(3) Appellants are estopped to assert the plea of the bar of the statute of limitations.

The only issue on this appeal is that of the bar of the statute of limitations, it having been conceded by appellants in the District Court that all other issues were correctly determined by the Deputy Commissioner. The clerical error of the Deputy Commissioner in computing the amount of compensation due Steffen was corrected in the court below.

FACTS.

In the latter part of February, 1938, the time being fixed by the storm and flood in the Los Angeles area (Ap. Case 10361, pp. 32, 39, 52, 53, 61), the appellee, Albert V. Steffen, was injured by a fall from a ladder onto a pontoon while acting within the scope and course of his employment as watchman on the S. S. Prentiss. He was not immediately disabled for work. In fact, right after he suffered the accident, he was requested by Fred H. Cordes, his employer's district manager and agent, to drive Cordes to San Francisco (Ap. Case. 10361, pp. 39, 40, 52, 53, 73) presumably on the business of the employer. Steffen rendered such service when required of him. (Ap. Case 10361, p. 36.) There was therefore no loss of time on the part of Steffen because of the accident prior to August 5, 1938, at which time he entered the United States Marine Hospital (Ap. Case 10361, p. 63), although he and Cordes were held up in Los Angeles by the storm and flood mentioned above.

Steffen continued to perform his duties as watchman until August 5, 1938, and received his regular compensa-

tion to that time. He was not disabled for work until August 5, 1938. (Ap. Case 10807, p. 20; Ap. Case 10361, p. 63.) Steffen reported the accident immediately after its occurrence (Ap. Case 10361, pp. 38, 39, 60) as well as thereafter, and Cordes obtained Steffen's admission to the Marine Hospital (Ap. Case 10361, pp. 40, 61) and promised to "take care" of Steffen, meaning medical and hospital care would be provided for and salary or compensation would be paid to Steffen while he was disabled and a job be given to him when he left the hospital. (Ap. Case 10361, pp. 41, 78, 79; Ap. Case 10807, p. 39.) There was more than just superior and employee relationship between Cordes and Steffen. They were also very friendly, and Steffen placed the utmost trust and confidence in Cordes and relied implicitly on Cordes' assurances of care and compensation until shortly before he filed his claim for compensation in January, 1941. (Ap. Case 10361, pp. 41, 42.)

Although Steffen orally notified Cordes on the day of his accident and on various occasions thereafter of his fall and that he suffered pain as the result thereof (Ap. Case 10807, p. 15; Ap. Case 10361, pp. 38, 40, 60, 77, 78), the employer has never made a report of Steffen's accident or injury to the Commissioner or Deputy Commissioner as required by Section 30(a) of the Longshoremen's and Harbor Workers' Compensation Act. As heretofore stated, Steffen entered the Marine Hospital on August 5, 1938, and remained there until December 22, 1941.

I.

THE ACCIDENT TO STEFFEN OCCURRED IN FEBRUARY, 1938.

At the risk of placing in this brief unnecessary material, but to clarify the time of the fall sustained by Steffen, we make mention that the time of the accident was fixed by both Steffen and Cordes by reference to the heavy rains and flood in the Los Angeles area, the uncertainty arising from statements that the flood occurred in 1937 or 1938, but more probably 1938.

This court may take judicial knowledge of all matters of general knowledge.

Muller, 208 U. S. 412, at 421.

And it may take judicial notice of facts relating to floods of rivers and streams.

Oklahoma v. Atkinson Co., 313 U. S. 508, at 525;

Mammoth Gold Dredging Co. v. Forbes, 39 C. A. App. (2d) 739;

31 *C. J. S.* 578, Note 3.

The court may therefore take judicial notice of the fact that the heavy rains mentioned in the testimony commenced in the last week in February, 1938; that the heaviest rains of that period occurred on March 1st and 2nd, 1938, and that the flood of the Los Angeles river mentioned by Steffen in fixing the time of the accident occurred in the first part of March, 1938, the accident having occurred a few days before. The accident therefore occurred in February, 1938.

II.

STEFFEN'S CLAIM IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Our consideration of the question of the statute of limitations falls into three divisions: (A) Steffen's right to file claim for compensation did not accrue until August, 1938; (B) The statute of limitations may be extended as to claims accrued but not barred; (C) The appellants are estopped to assert the bar of the statute of limitations.

A.

Steffen's Right to File Claim for Compensation Did Not Accrue Until August, 1938.

33 U. S. C. A. 913(a) provides that a claim for compensation shall be filed within one year after the injury. The term "injury" as used in this section means "compensable injury."

Di Giorgio Fruit Corp., et al. v. Norton, 93 Fed. (2d) 119;

Potomac Elec. Power Co. v. Cardillo, 107 Fed. (2d) 962;

Kropp v. Parker, 8 Fed. Supp. 290.

In the case of *Potomac Electric Power Co. v. Cardillo,* 107 Fed. (2d) 962, the employee was struck on the head by the metal end of an air hose on May 24, 1935. He was in the hospital two days and returned to work in a week. At that time he had no claim for compensation, the first seven days of disability not being compensable. Up to November 16, 1936, he was not disabled by reason of the accident. In 1937 he was informed that he was

suffering from a progressive disease of the brain caused by the accident of May, 1935. On August 18, 1937, he filed his claim for compensation. The court held that (1) an intent to bar claims under the Longshoremen's Compensation Act before they arise cannot fairly be imputed to Congress; (2) that the word "injury" as used in section 13(a) of the Act is equivalent to "compensable injury," and the limitation did not begin to run until the claim to compensation arose in 1936 or 1937; and (3) that no reason appears for treating death claims and disability claims differently in this respect or for thinking that the statute does treat them differently.

In *Di Giorgio Fruit Corp. v. Norton,* 93 Fed. (2d) 119, the employee was struck in the eye by a stalk of bananas on July 25, 1932. He returned to work in about a week. On August 11, 1936, he filed a claim for compensation for disability from the loss of the eye. He became aware of the serious condition of his eye in August, 1936. The court held that the word "injury" as used in the Act must be construed in the sense of "compensable injury," and hence claims filed more than one year after disability arose will not be barred.

Appellants cite *Glantz v. Indus. Acc. Comm.,* 11 Cal. App. (2d) 624, properly *Continental Cas. Co. v. Indus. Acc. Com.,* and apparently consider the holding of that case as being favorable to them. (Appellants' Op. Br. p. 20.) It is not. On the contrary, it is a decision wholly favorable to the respondents. In order to under-

stand the case, it is necessary to refer to its companion case, *Continental Cas. Co. v. Indus. Acc. Com.,* 11 Cal. App. (2d) 619, which is as follows:

"George Glantz was employed as a metal worker by H. E. Jaynes & Son whose compensation insurance carrier was the petitioner. About July 21, 1932, Glantz suffered an injury to his left wrist. This injury occurred in the course of, and grew out of, his employment. Glantz thought he had sprained his wrist, had it bound with tape and continued with his work. He was not incapacitated for work for a period of seven days though he might have missed a few days' work owing to pain in this wrist. On December 15, 1934, he suffered a second injury to the same wrist. While working on the door of an automobile it fell, cutting the flesh on the wrist to the bone. He consulted a physician and X-rays were taken which disclosed an old fracture of one of the bones of the wrist which had not united. It is admitted that this fracture occurred in the accident of July 21, 1932. It was the conclusion of examining physicians that an operation was necessary to unite the two fragments of the bone.

"On February 11, 1935, Glantz filed with the Industrial Accident Commission an application for the adjustment of his claim growing out of his first injury. During the hearing on this application, and on the advice of the commission, he filed an application for adjustment of his claim growing out of the injury of December 15, 1934. Two awards were made.

* * * * * * * *

"Petitioner urges in both cases that the proceedings are barred by the provisions of section

eleven of the Workmen's Compensation Insurance and Safety Act of 1917 (Stats. 1917, p. 831), as the proceedings were not instituted within six months following the fracture of the bone. . . .

"When the limitation, imposed by the Workmen's Compensation Insurance and Safety Act of 1917, commences to run, is a question that is carefully considered and discussed in Marsh v. Industrial Acc. Comm., 217 Cal. 338, page 344 (18 Pac. (2d) 933, 86 A. L. R. 563), where it is said: 'The law does not award compensation for mere pain or physical impairment, unless it is of such character as to raise a presumption of incapacity to earn. The object is to make amends for a disability attributable to the employment, and the test is whether there is an incapacity causing loss of earning power in whole or in part. (Hustus' Case, 123 Me. 428 (123 Atl. 514).) In order to be compensable, disability need not be limited to incapacity of a workman to pursue his ordinary occupation, but embraces impairment or earning power generally. (Gordon v. Evans, 1 Cal. Ind. Com., pt. 2, 94; Savich v. Industrial Com., 39 Ariz. 266 (5 Pac. (2d) 779.) The term "injury" then is to be understood as connoting compensable injury, and is correlated to an incapacity or disability justifying a compensatory award. (Dombrowski v. Jennings & Griffin Co., 103 Conn. 720 (131 Atl. 745).) Injury and compensable disability are thus more nearly synonymous expressions than are date of injury and date of accident. (Acme Body Works v. Koepsel, 204 Wis. 493 (234 N. W. 756, 236 N. W. 378).)'

"When we apply these rules to the instant case we must conclude that the injury to Glantz occurred when it was discovered that he had a broken bone in

his left wrist which would require an operation to cure, which would incapacitate him from working, and would justify a compensatory award. Prior to that time he did not know the nature of his injury, and had not been prevented from working for the required period, and his earning capacity had not been seriously impaired. It is true that he suffered pain and did lighter work than before July 21, 1932, but he did not suffer a compensable injury at that time as defined by the Supreme Court in the Marsh case. It follows that his application for compensation was not barred by the provisions of section eleven of the Workmen's Compensation Insurance and Safety Act of 1917."

In the second case, which is cited by appellants, the court held that "The injury of December 15, 1934, was not serious and resulted in no loss of time or pay. Of itself it is not a compensable injury. There is but one broken bone to repair and Glantz is entitled to but one compensatory award and that for the injury of July 21, 1932. That is fully taken care of in the award of the commission in the proceeding involving that injury. Any further award in the instant case is unnecessary, if not improper." It will be seen that there is nothing in the second case which denied recovery because of the statute of limitations. In fact, it affirmed the award in favor of the employee for the earlier injury.

In all the cases cited above, the injuries were traumatic in origin, and the term "injury" as used in 33 U. S. C. A. 913(a) and the California Workmen's Compensation Act was construed to mean "compensable injury"—*not the date of the accident* but the time from which the em-

ployee had a basis under the statute upon which to claim compensation, *such basis being only the existence of disability for work resulting in a loss of wages.* (Emphasis ours.) Since Steffen was not disabled for work until August, 1938, his compensable injury occurred on August 5, 1938. The statute of limitations in effect then and as modified by 33 U. S. C. A. 930(f) controls, and the claim was timely filed.

B.

The Statute of Limitations May Be Extended to Claims Accrued but Not Barred.

Section 30(f) of the Longshoremen's Compensation Act (33 U. S. C. A. 930(f)), became effective June 25, 1938. It provides that where the employer, or his agent, has knowledge of an injury to an employee and fails, neglects, or refuses to file a report thereof in the manner and as required by the provisions of subdivision (a) of section 30 of the Act, the limitation of section 13(a) shall not begin to run against the claim or in favor of either the employer or the carrier until such *employer's report* shall have been filed. (Emphasis ours.) The evidence shows that the employer knew of the injury, and it is uncontradicted that no such report was ever filed. Steffen's employer and the carrier do not contend that they gave notice to the Deputy Commissioner but maintain that because section 30(f) was added to the Act on June 25, 1938, which was subsequent to the date of the accident, it did not have the effect of extending Steffen's time for filing claim for compensation resulting from the disability which began on August 5, 1938.

It is fundamental that a statute must be construed in the light of the purposes it seeks to achieve and the evils it seeks to remedy, and that remedial legislation is entitled to a broad interpretation so that its public purposes may be fully effectuated.

South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251 at 259, 84 L. Ed. 732;

Binkley Mining Co. v. Wheeler, 133 Fed. (2d) 863 at 871.

The Longshoremen's and Harbor Workers' Compensation Act was designed to accomplish the same purpose as state workmen's compensation laws.

Ayers v. Parker, 15 F. Supp. 447.

It was patterned largely upon McKinney's New York Workmen's Compensation Law, and decisions construing particular provisions of the New York act before the passage of this Act are generally followed by federal decisions construing similarly worded provisions of this chapter.

Terminal Shipping Co. v. Branham, 47 F. Supp. 561; Affirmed 136 Fed. (2d) 655.

The accident in the instant case occurred in California. Therefore, we believe, the decisions of the United States Supreme Court, the New York court, and the California Supreme Court relative to situations similar to the one under consideration in this case should be determinative of the issue, but other federal cases will also be cited.

As limitation laws prescribing the time within which particular rights may be enforced relate to remedies only,

it is well settled by the authorities that the legislature has the power to increase the period of time necessary to constitute limitation, and to make it applicable to existing causes of action, provided such change is made before the cause of action is extinguished under the pre-existing statute of limitations.

> 46 *A. L. R.* 1101 (Citing U. S. Supreme Court decisions);
>
> *Davis & McMillan v. Industrial Accident Commission,* 198 Cal. 641, at 636-637.

A common expression of the rule is that no one has a vested right in any particular allowance of time unless it has already run in his favor, that is, unless the statute of limitation has completely run and barred the action.

Paramino Lbr. Co. et al. v. Marshall, 309 U. S. 370, which originated in the 9th Circuit in the State of Washington, involved a private act of Congress which directed the Deputy Commisisoner to review a compensation order filed under the Longshoremen's Act even though the right to do so under the Act *had expired five years previously.* (Emphasis ours.) The employer and carrier urged that the time limitation is inseparable from the right, citing *Young v. Hoage,* 90 F. (2d) 395; *Ayers v. Parker,* 15 F. Supp. 445, and *Koblikin v. Pillsbury,* 103 F. (2d) 667, and that

> "The lapse of the time limit on such statutory causes of action not only bars the remedy but destroys the liability as well, and an act of the legislature reviving them constitutes a deprivation of property without due process of law."

This is precisely the position taken by the appellants in the instant case, and *Young v. Hoage, supra,* and *Kobilkin v. Pillsbury, supra,* are the cases principally relied upon by appellants. The United States Supreme Court in *Paramino Lbr. Co. v. Marshall* has held to the contrary, and stated in this respect:

> "The argument of appellants is that the original award was an adjudication on which further review was barred prior to the enactment of the private act; that thereby rights and obligations were finally determined, the deprivation of which took from appellants a substantive immunity from further claims of Clark and created in Clark new substantive rights.
>
> "* * * But we do not agree that the immunity obtained by the lapse of the time for review is the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim. This private act does not set aside a judgment, create a new right of action or direct the entry of an award. The hearing provided for is subject to the provisions of the general act for Longshoremen's and harbor workers' compensation. It does not operate to create new obligations where none existed before. * * *
>
> "It is unimportant whether the claim persisted after the bar or ended with the running of limitation. To cure a fault of administration Congress may validly enact this act."

If, then, a barred right may be *restored* by a private relief measure (barred after lapse of time), it would seem clear that a time limit may be extended by a general amendment to the law and such extension apply in cases in which the bar of limitations has not as yet operated. This case should be regarded as controlling in principle.

In *Orton v. Olds Motor Works,* 240 N. Y. S. 570, a situation similar to that existing herein with respect to the statute of limitations under the New York Workmen's Compensation Law was presented. It was claimed that there was no right to apply a statute extending time to claims already accrued when the amendment went into effect. At that time the law provided that the right to claim compensation should be barred unless within one year after the accident a claim for compensation was filed with the Commission. The law was amended, effective July 1, 1928, permitting the filing of a claim for compensation after the expiration of one year from the date of the accident, but not exceeding two years, where the Commission shall find that such filing is in the interest of justice. Claimant filed his claim on March 6, 1929, which the Commission accepted. Upon a review of the compensation award the court said that it saw "no reason why the amendment should not apply to *claims accrued but not extinguished.* This claim had not been extinguished at the time the amendment went into effect. The year for filing a claim did not expire until the following February. *The amendment became part of the provisions of the statute dealing with rules of limitation in the prosecution of a claim affecting the remedy only and not the substantive right to compensation.* The period of limitation, though it had begun to run, could be extended by the board." (Emphasis ours.)

Accord:

Davis v. Rust et al., 247 N. Y. S. 309, at 311;

Sanders v. Children's Aid Soc., 265 N. Y. S. 698, at 700.

Davis & McMillan v. Industrial Accident Commission, 198 Cal. 631, 46 A. L. R. 1095, is an outstanding case on the subject under consideration. It is a case arising under the Workmen's Compensation Act of California. The situation there is parallel to the instant case with respect to the questions raised by the appellants herein on the statute of limitations as to a cause of action accrued but not barred. There, as here, it was claimed that the legislature had no power to extend the statute of limitations as to a claimed vested right to have the statute become operative as of a certain date. We do not want to encumber this brief by quoting extensively from the decision of the California Supreme Court, but we suggest to this court that the California decision answers every contention raised by appellants herein adversely to the contentions of appellants and in complete favor of the appellees.

There have been no decisions under the Longshoremen's Act determining whether or not section 30(f), extending the period for filing claims, applies to claims for injuries which had accrued but which had not expired at the time of the effective date of the amendment. In two cases, however, involving an amendment to section 22 of the Act, the courts have held that the amendment was retroactive.

In the case of *New Amsterdam Casualty Company v. Cardillo,* 108 Fed. (2d) 492, at 493, the court said:

> "We think, in this view, that the passage of the amendment neither creates new, nor destroys rights. It applies only to the remedy, and from its date it permits the deputy to enlarge or diminish the former award to meet the circumstances of a particular case.

> We think Congress had the power *to extend* or to contract the *period of limitation* as applicable to an indemnity claim *either pending* or subsequently brought."

To the same effect is *Bethlehem Shipbuilding Corporation v. Cardillo,* 102 Fed. (2d) 299.

Streeter v. Great Lakes Transit Corp., 49 F. Supp. 466; *Chisholm v. Cherokee-Seminole S. S. Corp., et al.,* 36 F. Supp. 967, and *Gahling v. Colabee S. S. Co.,* 37 F. Supp. 759, were cases under the Jones Act relating to seamen, and it was held in those cases that the employer had not acquired any vested rights when the period of limitations was extended and that the statute of limitations may be extended to existing causes not barred.

This Circuit Court of Appeals has held that the principle applicable to extension of time under a statute of limitations is the one which extends the time for the full period of the limitation from the date of the amendment.

> *Carscadden v. Territory of Alaska,* 105 Fed. (2d) 377.

In the instant case it would clearly appear that the claimant, Albert V. Steffen, who was injured in February, 1938, came within the protection of section 30 (f) of the Act, either by reason of the fact that his disability began in August, 1938, which was after the effective date of section 30(f), or by reason of the fact that the amend-

ment applied to claims accrued but not barred on the effective date of the amendment, and it is the position of appellees that the claim was timely filed by reason of both.

C.

Appellants Are Estopped to Assert the Plea of the Bar of the Statute of Limitations.

In the present case, Fred Cordes, the employer's agent and district manager, under whose jurisdiction Steffen worked, promised Steffen that Steffen would be taken care of, that is, that Steffen would be given compensation, medical and hospital care, and a job when he left the hospital. Cordes and Steffen were on very friendly terms and Steffen believed in Cordes implicitly and relied on his promises and was thereby lulled into a sense of security. Cordes did, in fact, obtain Steffen's admission to the Marine Hospital and visited him there. This condition lasted until shortly before Steffen filed his claim for compensation, when he became disillusioned.

Although the majority and minority opinions in *Marshall v. Pletz,* 317 U. S. 383, 87 L. Ed. 348, were opposed to each other on the question of whether the facts there warranted the application of the doctrine of estoppel, that the doctrine is applicable in a proper case under the Longshoremen's Act was and is unquestioned, and, we think, is clearly applicable in the instant case. The employer, by promising to "take care" of Steffen, is estopped to assert the bar of the statute of limitations.

III.
ANALYSIS OF APPELLANTS' OPENING BRIEF.

A.

On page 9 of Appellants' Opening Brief, appellants purport to set forth the contentions of the respondent Steffen. The quoted matter is in fact the contention of appellants and not of Steffen and is contained in the MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR JUDGMENT filed by Mr. Tipton. (Ap. Case 10807, p. 85.) We do not deem this of any particular importance, but call the court's attention to it because apparently appellants give some weight to it as having been the contention of Steffen. Our contentions are broader in scope.

B.

Appellants contend that Steffen was paid disability compensation for several days while in Los Angeles after the attempt of Cordes to drive to San Francisco was made impossible by the storm and flood. (Appellants' Op. Br. p. 15.) The fact is that Steffen was not paid any disability compensation during that time. As previously shown, Cordes requested Steffen to drive him to San Francisco, and Steffen rendered such service when required of him. Presumably this was on the business of the employer, whose place of business is in San Francisco. The storm and flood made it necessary to remain in Los Angeles a few days. There was therefore no loss of time prior to August, 1938, on the part of Steffen and no disability compensation paid to him as claimed by appellants. If anything more need be said, there is no

disability claim allowable under the Act for the first seven days of disability, and Steffen could not have filed such a claim, assuming for discussion only but not at all admitting that appellants' position has some validity. (33 U. S. C. A. 906.)

C.

Appellants assert that section 913(a) of the Act is not a statute of limitation but creates a substantive right in their favor. (Appellants' Op. Br. pp. 16 to 19.)

It is the general rule that the statute of limitations is waived unless pleaded. (*Gormley v. Bunyan,* 138 U. S. 623.) It is unnecessary to multiply authority on this principle. If appellants' position were correctly taken, it would not have been necessary for appellants to raise the defense of the bar of the statute of limitations under the cases cited by them. Section 913(b) of the Act provides otherwise, as follows:

> "Notwithstanding the provisions of subdivision (a) failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and an opportunity to be heard."

What is this provision but a declaration in the Act that unless the statute of limitations is asserted as a defense at the first hearing it is waived? This corresponds to raising the bar of the statute of limitations by answer or demurrer as required in ordinary actions, or waiving it by failure to do so.

We also call attention to the provisions of 913(c) and 913(d), as well as 930(f), of the Act, all of which limit the application of section 913(a), and, we believe, establish beyond cavil that 913(a) is a true statute of limitations going only to the remedy and as such comes within the principles set forth in our brief.

The contention of appellants that the Act creates vested rights in them with respect to the statute of limitations and that the Act is not remedial in character is erroneous. In *De Wald v. Baltimore & O. R. Co.,* 71 Fed. (2d) 810, and *Grain Handling Co. v. McManigal,* 23 F. Supp. 748, it is held that the Act is remedial and should be liberally construed and where there is any doubt it should be resolved in favor of the injured employee. (And see 33 U. S. C. A. 901, Note 4.) The error of the appellants is a fundamental one, and their authorities on this subject do not sustain them in the instant case. Nevertheless, we might add that with the exception of *Guy v. Stoecklin Baking Co.,* 1 Atl. (2d) 839, the cases cited by appellants on this point do not deal with statutes of limitation, and that that case, by its terms, is limited by the court to Pennsylvania and is not an authority herein.

D.

The question of the date of injury (Appellants' Op. Br. pp. 19 to 23) is covered by point II A. of this brief.

Otis v. Parrott, et al., 8 N. W. (2d) 708 (Appellants' Op. Br. p. 19) was based on the peculiar wording of the Iowa statute. After recognizing that in other named states "injury" means "compensable injury," the Iowa statute is distinguished. Furthermore, under the Iowa statute the failure of the employer to make a report of an

injury resulting in disability to the commissioner did not create a waiver of the statute of limitations. Under the Longshoremen's Act such failure, as heretofore pointed out, constitutes a waiver. The case is not an authority herein.

Liberty Mut. Ins. Co. v. Parker, 19 F. Supp. 686 (Appellants' Op. Br. p. 22), is distinguished from *Kropp v. Parker,* 8 F. Supp. 290, on the facts. The principle of the *Kropp* case is not repudiated but is affirmed. The distinction is questionable in view of the cases of higher courts cited herein.

E.

The appellants discuss the question of whether section 930(f) is retroactive in their brief, pages 23 to 27. The contention of appellants that if section 930(f) applies to actions accrued but not barred on June 25, 1938, it will be necessary for insurance carriers to reopen their files and take out every case of injury which occurred from the inception of the Act to June 25, 1938, is without merit. Cases against which the bar of the statute of limitations had already run on June 25, 1938, generally speaking, are not affected by the amendment.

The cases cited by appellants under this point are not authorities herein, particularly since the decision in *Paramino Lbr. Co. v. Marshall,* 309 U. S. 370, was handed down on March 11, 1940.

F.

On pages 27 to 29 of their brief, appellants again contend that their right in the statute of limitations was a vested right. Their contention is based on the erroneous assumption that the defense of the statute of limitations is jurisdictional. As heretofore established by the authorities cited in this brief, the statute of limitations in the Longshoremen's Act are remedial only.

G.

With respect to the *Kobilkin* case, 103 Fed. (2d) 667 (Appellants' Op. Br. pp. 29 to 32), we think there is conflict between the decision of this court and the decisions of other Circuit Courts of Appeal which we have cited. However, the *Kobilkin* case does not involve section 930(f) at all. In addition, we call attention to the fact that in *Paramino Lbr. Co. v. Marshall,* 309 U. S. 370, the same contentions were made as are now made by the appellants herein, and the *Kobilkin* case and *Young v. Hoage,* 90 Fed. (2d) 395, were cited and relied upon by the appellants there. The United States Supreme Court decided the issue adversely to appellants' contentions, and we think the principle of *Paramino Lbr. Co. v. Marshall, supra,* is controlling here and disposes of the case in favor of respondents and against appellants herein with respect to the plea of the bar of the statute of limitations.

CONCLUSION.

The Longshoremen's and Harbor Workers' Compensation Act must be liberally construed so that the rights of employees will not be defeated by mere technicalities. (*Candado Stevedoring Corp. v. Lowe,* 85 Fed. (2d) 119, at 121.) The Act should also be construed liberally to avoid harsh or incongruous results. (*Baltimore & Phila. Steamboat Co. v. Norton,* 284 U. S. 408, at 414.)

Whether it is held that Steffen's injury occurred on August 5, 1938, which was after the amendment of the Act, or that the amendment applied to claims accrued but not barred on its effective date, the result is the same. In either or both cases the claim of Steffen was filed in time. It is also submitted that the doctrine of estoppel is applicable and prevents the appellants from claiming the bar of the statute of limitations in any event. Therefore, under the facts and the law of the instant case, the decisions of the Deputy Commissioner and the District Court were correct and should be affirmed.

Respectfully submitted,

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